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# In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
*Petitioner*,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
*Respondents*.

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## BRIEF OF DAVID ORENTLICHER AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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**Cases**:

*Grutter v. Bollinger*,
539 U.S. 306 (2003) . . . . . 4

*United States v. Brown Univ.*,
5 F.3d 658 (3d Cir. 1993) . . . . . 30, 31

*United States v. Brown Univ.*,
805 F. Supp. 288 (E.D. Pa. 1991) . . . . . 31

**Other Authorities**:

Nick Anderson, *George Washington University Applicants No Longer Need to Take Admissions Tests*, Wash. Post, July 27, 2015 . . . . . 26

Richard C. Atkinson and Saul Geiser, *Reflections on a Century of College Admissions Tests*, in *SAT Wars: The Case for Test-Optional College Admissions* (Joseph A. Soares ed. 2012) . . . . . 24

William G. Bowen, Matthew M. Chingos, and Michael S. McPherson, *Crossing the Finish Line: Completing College at America's Public Universities* (2009) . . . . . 25

John Brittain and Benjamin Landy, *Reducing Reliance on Testing to Promote Diversity*, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas (Richard D. Kahlenberg ed. 2014) . . . . . 24, 25, 26

Anthony P. Carnevale, Stephen J. Rose, and Jeff Strohl, *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas (Richard D. Kahlenberg ed. 2014) ..... 29

Anthony P. Carnevale and Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* (July 2013) ..... 8, 10

Sheryll Cashin, *Place, Not Race: A New Vision of Opportunity in America* (2014) ..... 5, 6, 11

Raj Chetty and Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* (May 2015) ..... 6, 7

Kalena E. Cortes and Andrew I. Friedson, *Ranking Up by Moving Out: The Effect of the Texas Top 10% Plan on Property Values*, 67 Nat'l Tax J. 51 (2014) ..... 14

Kalena E. Cortes and Lei Zhang, *The Incentive Effects of the Top 10% Plan* (June 2012) .. 20, 21

James Crouse, *Does the SAT Help Colleges Make Better Selection Decisions?*, 55 Harv. Educ. Rev. 195 (1985) ..... 25

Julie Berry Cullen, Mark C. Long, and Randall Reback, *Jockeying for Position: Strategic High School Choice under Texas' Top Ten Percent Plan*, 97 J. Pub. Econ. 32 (2013) ..... 14, 22

Stacy B. Dale and Alan B. Krueger, *Estimating the Effects of Characteristics over the Career Using Administrative Earnings Data*, 49 J. Hum. Resources 323 (2014) . . . . . 9

Peter Dreier and Richard D. Kahlenberg, *Making Top Colleges Less Aristocratic and More Meritocratic*, N.Y. Times, Sept. 12, 2014 . . . . . 8

Kevin Eagan et al., *The American Freshman: National Norms Fall 2014* (2014) . . . . . 18

FairTest: National Center for Fair & Open Testing, *180+ "Top Tier" Schools which Deemphasize the ACT/SAT in Admissions Decisions per U.S. News & World Report* Best Colleges *Guide (2015 Edition)* . . . . . 26, 27

Matthew N. Gaertner, *Advancing College Access with Class-Based Affirmative Action: The Colorado Case*, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas (Richard D. Kahlenberg ed. 2014) . . . . . 29

Jessica Gross, *Who Made That? (College Application)*, N.Y. Times, Nov. 10, 2013 . . . . . 30

William C. Hiss and Valerie W. Franks, *Defining Promise: Optional Standardized Testing Policies in American College and University Admissions* (Feb. 2014) . . . . . 26

Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 Rev Econ. & Stat. 717 (2009) . . . . . 9

Don Hossler, Jacob P.K. Gross and Brandi M. Beck, *Putting the College Admission "Arms Race" in Context: An Analysis of Recent Trends in College Admission and Their Effects on Institutional Policies and Practices* (2010) . . . . . 17

Caroline M. Hoxby, *The Changing Selectivity of American Colleges*, 23(4) J. Econ. Persp. 95 (2009) . . . . . 9

Caroline M. Hoxby, *The Return to Attending a More Selective College: 1960 to the Present*, in *Forum Futures Exploring the Future of Higher Education, 2000 Papers* (Maureen Devlin and Joel Meyerson eds. 2001) . . . . . 9

Paul A. Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy* (Aug. 2015) . . . . . 5

Mark C. Long, Victor Saenz, and Marta Tienda, *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 Annals Am. Acad. Pol. & Soc. Sci. 82 (2010) . . . . . 7

John E. Morton and Isabel V. Sawhill, *Economic Mobility: Is the American Dream Alive and Well?* (May 2007) . . . . . 6

Sunny X. Niu and Marta Tienda, *Minority Student Academic Performance under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 32 Educ. Eval. & Pol'y Analysis 44 (2010) . . . . . 15, 24

David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 Notre Dame L. Rev. 181 (1998) . . . 11

David Orentlicher, *Economic Inequality and College Admissions Policies* (Sept. 2015) . . . . . 1

David Owen and Marilyn Doerr, *None of the Above: The Truth Behind the SATs, Revised and Updated* (1999) . . . . . 27

Thomas Piketty, *Capital in the Twenty-First Century* (2014) . . . . . 4

*Ranking Colleges by Selectivity*, N.Y. Times, Apr. 4, 2013 . . . . . 18

Richard Rothstein, *Racial Segregation and Black Student Achievement*, in *Education, Justice, and Democracy* (Danielle Allen and Rob Reich eds. 2013) . . . . . 6

Robert J. Sampson, Patrick Sharkey, and Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability among African-American Children*, 105 Proc. Nat'l Acad. Sci. 845 (2008) . . . . . 5

Richard H. Sander, *Class in American Legal Education*, 88 Denv. U. L. Rev. 631 (2011) . . . . 30

Mark Schneider, Paul Teske, and Melissa Marschall, *Choosing Schools: Consumer Choice and the Quality of American Schools* (2000) . . 13

Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland* (2010) ..... 7

Patrick Sharkey, *Neighborhoods and the Black-White Mobility Gap* (July 2009) ..... 6

Patrick Sharkey and Bryan Graham, *Mobility and the Metropolis: How Communities Factor into Economic Mobility* (Dec. 2013) ..... 5, 6

Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953 (1996) ..... 25

Marta Tienda, *Striving for Neutrality: Lessons from Texas in the Aftermath of* Hopwood *and* Fisher, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas (Richard D. Kahlenberg ed. 2014) ..... 27

The University of Texas at Austin, *Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature: For the Period Ending Fall 2014* (Dec. 2014) ..... 15

Geoffrey T. Wodtke, David J. Harding and Felix Elwert, *Neighborhood Effects in Temporal Perspective: The Impact of Long-Term Exposure to Concentrated Disadvantage on High School Graduation*, 76 Am. Soc. Rev. 713 (2011) ..... 5

Teresa Wonnell, Chloe Melissa Rothstein, and John Latting, *Predictors of Academic Success at a Highly Selective Private Research University*, in *SAT Wars: The Case for Test-Optional College Admissions* (Joseph A. Soares ed. 2012) . . . 25, 26

## INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed by and on behalf of David Orentlicher,[1] who is Samuel R. Rosen Professor at the Indiana University Robert H. McKinney School of Law.[2] Prof. Orentlicher teaches and writes about constitutional law and public policy and also served for six years as State Representative in the Indiana General Assembly. He submits this brief in the hope that its analysis of top class rank college admissions policies will be of value to the Court.[3]

## SUMMARY OF ARGUMENT

Because the Texas top class rank policy for college admissions plays a key role in this case, this brief addresses a critical aspect of top class rank policies—their impact on socioeconomic inequality in the United States. While it is difficult to design or

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[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Reimbursement for printing expenses may be sought from funds made available by Indiana University Robert H. McKinney School of Law to faculty for their professional activities.

[2] Institutional affiliation is provided for identification purposes only. This brief does not purport to present the institutional views, if any, of Indiana University Robert H. McKinney School of Law.

[3] The argument here is drawn from David Orentlicher, *Economic Inequality and College Admissions Policies* (Sept. 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642533.

enact public policies that address economic inequality, top class rank policies provide an important way for the country's elite universities to promote true opportunity for all of America's children. Current admissions policies at leading universities reward family decisions about school choice and housing that do much to exacerbate the problem of inequality. Top class rank policies, on the other hand, reward parental choices that promote greater economic equality. As empirical evidence from Texas indicates, top class rank policies can do much to reduce economic inequality in the United States.

## ARGUMENT

As this Court considers the role that top high school class rank policies can play in the college admissions process, the Court should recognize the full range of benefits and detriments from the policies.[4] While this brief will not try to address all of the advantages and disadvantages of top rank policies—other briefs will canvass most of that ground—it will discuss an important aspect of top class rank policies that typically receives insufficient attention: the incentives such policies create for greater socioeconomic opportunity in lower-income communities and therefore for greater economic equality in the United States.

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[4] Top class rank policies are admissions policies that guarantee automatic admission for, or give preference to, applicants who finish in the top part of their high school class rank. Top class rank policies are often referred to as top ten percent policies because the Texas class rank policy guarantees admission to the state's public universities for students whose grade point average (GPA) places them in the top ten percent of their high school graduating class, with a modification for the University of Texas at Austin (UT-Austin). In order to limit top class rank admissions to 75 percent of the entering class at UT-Austin, Texas guarantees admission to that campus for high school students in the top seven or eight percent of their high school class. California gives preferential—but not guaranteed—admissions to colleges in the UC system to the top nine percent of high school graduates, based on a combination of GPA and test scores, and Florida has an automatic admissions policy to one of the state's universities for students whose GPA places them in the top twenty percent of their high school class rank. Top class rank policies are not limited to the United States. In July 2013, the French Parliament enacted a top class rank policy for the country in order to ensure equal access to higher education for immigrant, low-income, and rural students.

In other words, top class rank policies should not be seen simply as alternatives to affirmative action for colleges that want to promote diversity in their student bodies. Rather, the broader societal benefits from top class rank policies make them very valuable regardless of the extent to which a university employs affirmative action policies.

## I. ECONOMIC INEQUALITY COMPROMISES ECONOMIC MOBILITY IN THE UNITED STATES

More than a decade ago, this Court recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that a key justification for affirmative action policies lies in their ability to open the doors of this country's universities to persons from all walks of life. Because education plays such a central role in preparing students for work and citizenship, "all members of our heterogeneous society" must have access to the academic institutions "that provide the training and education necessary to succeed in America." *Id.* at 332-333.

But the country's high levels of economic inequality create substantial and often insurmountable obstacles to success for many of America's children. In recent decades, economic inequality has greatly increased, with the top ten percent of families reaching a fifty percent share of income in the United States in 2007, the first time that has happened (according to data going back to 1910).[5] The rich have been getting richer and the poor are increasingly being left behind.

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[5] Thomas Piketty, *Capital in the Twenty-First Century* 24 (2014).

The problem of economic inequality is worsened by stratified residential geography. The well-to-do are less likely than in the past to live next door to the indigent, leaving many of the poor in neighborhoods that are socially isolated from their more prosperous counterparts.[6] As a result, many children live in "high-disadvantage" communities that suffer from high rates of poverty, under-resourced, low-performing schools, high levels of unemployment and crime, and increased environmental risks to health.[7] These community detriments have lifelong implications, especially for black children who live there. A black child growing up in a high-poverty community suffers from diminished cognitive skills,[8] reduced high school graduation rates,[9]

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[6] Paul A. Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy* (Aug. 2015), http://apps.tcf.org/architecture-of-segregation; Patrick Sharkey and Bryan Graham, *Mobility and the Metropolis: How Communities Factor into Economic Mobility* 7 (Dec. 2013), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/MobilityandtheMetropolispdf; Sheryll Cashin, *Place, Not Race: A New Vision of Opportunity in America* 25 (2014).

[7] Geoffrey T. Wodtke, David J. Harding, and Felix Elwert, *Neighborhood Effects in Temporal Perspective: The Impact of Long-Term Exposure to Concentrated Disadvantage on High School Graduation*, 76 Am. Soc. Rev. 713, 715-716 (2011).

[8] Robert J. Sampson, Patrick Sharkey, and Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability among African-American Children*, 105 Proc. Nat'l Acad. Sci. 845 (2008).

[9] Wodtke et al., *supra* note 7, at 729.

and downward economic mobility.[10] The United States is no longer the land of opportunity that it promises to be. The odds of climbing the socioeconomic ladder are low for those on the bottom rungs, and well below the odds in other Western developed countries.[11]

Being poor presents serious obstacles to a child's future. But growing up in a poor community presents even more serious obstacles to success. Research has shown that "the more economically segregated a metro area is, the less economically mobile its residents are" and that what matters more for economic mobility is not the degree of economic inequality but the degree to which neighborhoods are economically segregated.[12] Thus, for example, studies have shown that the economic mobility of poor children improves when their families move from a high-poverty neighborhood to a more advantaged community.[13]

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[10] Patrick Sharkey, *Neighborhoods and the Black-White Mobility Gap* 2-3 (July 2009), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2009/pewneighborhoods1pdf; Cashin, *supra* note 6, at 24. See also Richard Rothstein, *Racial Segregation and Black Student Achievement*, in *Education, Justice, and Democracy* 173, 173 (Danielle Allen and Rob Reich eds. 2013).

[11] Economic mobility is 2.5 times higher in Canada and more than 3 times higher in Denmark than in the United States. John E. Morton and Isabel V Sawhill, *Economic Mobility: Is the American Dream Alive and Well?* 5 (May 2007), http://www.pewtrusts.org/en/research-and-analysis/reports/2007/05/25/is-the-american-dream-alive-and-well.

[12] Sharkey and Graham, *supra* note 6, at 9-10.

[13] Raj Chetty and Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure*

## II. TRADITIONAL COLLEGE ADMISSIONS POLICIES EXACERBATE ECONOMIC INEQUALITY

Upper-income families have many reasons to carve out exclusive residential enclaves, independent of college admissions policies. They can create communities with low crime rates, low poverty rates, and excellent schools. Nevertheless, college admissions policies play an important role as well. These policies have done much to reward and therefore accelerate residential segregation by income in America.

Currently, when thinking about their children's prospects for admission to college, upper-income parents recognize that they are better off with a two-tiered educational system in which their children attend a small number of high-performing schools that the Ivy League and other elite universities rely upon as "feeder" schools.[14] The parents' children will be better prepared for the SAT or ACT exams, and selective colleges will dip deeper into the schools' senior classes

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*Effects and County-Level Estimates* (May 2015), http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf. See also Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland* (2010), http://www.tcf.org/assets/downloads/tcf-Schwartz.pdf.

[14] At the University of Texas at Austin, for example, half of the 1996 entering class came from only about four percent of high schools in Texas (59 out of more than 1,500 statewide). Mark C. Long, Victor Saenz, and Marta Tienda, *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 Annals Am. Acad. Pol. & Soc. Sci. 82, 84-85 (2010).

in making offers of acceptance. Parents with means therefore prefer a residential geography with a relatively small number of higher-income communities that have higher-performing school districts.

In these higher-income communities, the parents wield their political influence and wealth on behalf of their children. They lobby for increases in public funding for their school districts, and they also generate greater private funding by creating foundations that supplement their school districts' government dollars. In addition, they provide their children with the other advantages of prosperous communities.

Reserving their influence and wealth for their own children has paid ample dividends for the well-to-do. At the 193 most selective colleges and universities in the United States, students from the richest quartile of the population outnumber students from the poorest quartile by a ratio of fourteen to one.[15] And there are many benefits to students who attend an elite university. Their institutions spend much more on them than would lower-ranked schools, they are more likely to earn a bachelor's degree and gain acceptance to graduate or professional school,[16] and they enjoy

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[15] Peter Dreier and Richard D. Kahlenberg, *Making Top Colleges Less Aristocratic and More Meritocratic*, N.Y. Times, Sept. 12, 2014.

[16] Anthony P Carnevale and Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 24-25 (July 2013), https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf. In 2007, highly-selective colleges spent $92,000

higher lifetime earnings.[17] Moreover, students at elite universities are more likely to form friendships and develop other ties with classmates who will become leaders in government, business, and the professions.[18]

In short, by leveraging their wealth to create exclusive and advantaged communities, well-to-do parents are better able to secure seats in the elite

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per student while low-selectivity colleges spent only $12,000 per student. Caroline M. Hoxby, *The Changing Selectivity of American Colleges*, 23(4) J. Econ. Persp. 95, 109 (2009).

[17] Caroline M. Hoxby, *The Return to Attending a More Selective College: 1960 to the Present*, in *Forum Futures Exploring the Future of Higher Education, 2000 Papers* (Maureen Devlin and Joel Meyerson eds. 2001). According to one estimate, attending a state flagship university can yield an increase of around twenty percent in annual earnings by age 28-33. Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 Rev. Econ. & Stat. 717, 724 (2009). Some researchers have not found an earnings premium for the typical student from attendance at an elite university. Stacy B. Dale and Alan B. Krueger, *Estimating the Effects of Characteristics over the Career Using Administrative Earnings Data*, 49 J. Hum. Resources 323, 325-326 (2014). But even under their analysis, students from disadvantaged backgrounds realize a substantial earnings premium from attending a selective college. *Id.* at 326. In other words, when students from lower-income families are excluded from elite universities, they lose an important opportunity to ascend the socioeconomic ladder.

[18] The U.S. president, every justice on this court, and around half of U.S. senators have earned an undergraduate, graduate, or professional degree at a top university.

universities for their children and ensure an intergenerational reproduction of privilege.[19]

As indicated, college admissions policies are not the only factor influencing economic inequality. But the policies play an important role. Moreover, top class rank polices could provide a counterbalance to economic inequality from all causes. That is the topic of the next section of this brief.

## III. TOP CLASS RANK POLICIES PROMOTE ECONOMIC EQUALITY

While top class rank policies have been adopted in Texas and other states for their ability to promote diversity in college student bodies, that important benefit of top class rank policies is not the point of this brief. Rather, this brief focuses on what top class rank policies offer beyond their ability to improve student body diversity. As economic theory predicts, and empirical evidence from Texas shows, top rank policies can play a critical role in promoting the economic integration of America's neighborhoods and thereby in fostering a greater degree of economic equality in the United States.

### A. Top Class Rank Policies Provide Incentives for Economic Equality

Consider what would happen if top class rank policies were implemented widely, by all selective universities in the United States, private as well as public. That is, the universities would only admit students who placed in the top five or ten percent of

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[19] Carnevale and Strohl, *supra* note 16, at 7.

their high school class rank.[20] With universal use of top class rank policies, students attending high-performing high schools would lose their advantage in the admissions process. Finishing in the top rank of a lower-performing school would be preferable to finishing just below the top rank at a strong school. In a world of top class rank policies, the odds of gaining admission to Yale, the University of Chicago, or Stanford would be much greater from urban high than from suburban or private high.[21] The incentive for parents to congregate in a small number of high-performing school districts would drop substantially. And that incentive would be replaced by a strong incentive to disperse over a large number of school districts.[22]

As higher-income families moved to lower-performing school districts, there would be many important benefits. For the lower-performing schools, there would be a stronger constituency supporting

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[20] Because they draw from a national applicant pool and are more selective than UT-Austin and other top public universities, elite private universities might need a higher threshold than the Texas top ten percent for a top class rank policy. This question is discussed, *infra*, pages 18-19.

[21] While urban communities often suffer from higher rates of poverty than do suburban communities, there are many distressed suburban and rural communities too. Cashin, *supra* note 6, at 25-26. Top class rank policies would help distressed suburban and rural communities as well.

[22] David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 Notre Dame L. Rev. 181, 190 (1998).

increases in financial resources. The families still would lobby for increases in public funding and support greater private funding through school district foundations, but they would do so for the lower-performing school districts. And the benefits would extend to K-8 education, partly because funding is allocated on a district-wide basis and also because many families will not wait until high school to choose their school districts or because families will enroll their younger children in K-8 grades when they enroll their older children in high schools.

In addition to the benefits for lower-performing schools, there would be other important benefits for disadvantaged communities from an inflow of families with higher incomes. Poverty rates, unemployment rates, and crime rates would fall in those communities, and their revenues would rise from property taxes and other local levies. Top class rank policies would make disadvantaged communities much less disadvantaged, both because the communities would suffer from fewer of the ills of poverty and also because they would enjoy larger tax bases. Their local governments would be in a better position to invest in infrastructure and finance public services. Indeed, top class rank policies could do much to correct the imbalances in tax revenues that exacerbate socioeconomic disparities in the United States.

Most importantly, by creating a greater degree of residential integration by income, top class rank policies would give children in all communities a meaningful opportunity to move up the socioeconomic ladder. Top class rank policies directly address the

obstacles to economic equality in the United States from stratified residential geography.

### B. Empirical Evidence from Texas Illustrates the Benefits of Top Class Rank Policies

Of course, an important question is whether parents really would choose less competitive, lower-performing high schools to guarantee a top high school class rank for their children. College prospects are a leading consideration for families when choosing a high school,[23] but they are not the only reason why parents prefer higher-performing schools for their children and wealthier school districts for their residences. Moreover, a lower-performing school may not provide as strong a preparation for the rigors of college study.

On this question, we have important empirical evidence from the implementation of the Texas top class rank policy, and the studies indicate that top class rank policies do in fact cause families to select lower-performing schools and school districts. A leading study looked at decisions about high school choice, and researchers found that among students with both an interest in attending a flagship public university in Texas and an opportunity to strategically enroll in a

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[23] Mark Schneider, Paul Teske, and Melissa Marschall, *Choosing Schools: Consumer Choice and the Quality of American Schools* 91 (2000) (describing survey data with 69 percent of parents listing college matriculation rate as a reason for their children's schools' high quality).

different high school, families for at least 5 percent of students made the strategic choice.[24]

Not only do families choose lower-performing schools, they also choose to live in lower-performing school districts. A study on this question found that after adoption of the Texas top class rank policy, increases in property values were significantly higher in lower-performing than in higher-performing school districts, especially in the lowest-performing districts.[25] And the increases in property taxes could be quite meaningful, measuring in the millions of dollars per district (though still in the range of about 8 percent of total property tax revenues).[26]

To be sure, the impact has been modest, but one would not expect a huge impact from the Texas top class rank policy. While students' chances for admission to the state's public universities are higher if they apply from a lower-performing high school, their chances for admission to selective private universities or out-of-state public universities remain greater from higher-performing high schools. For students who want

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[24] Julie Berry Cullen, Mark C. Long, and Randall Reback, *Jockeying for Position: Strategic High School Choice under Texas' Top Ten Percent Plan*, 97 J. Pub. Econ. 32, 44 (2013). The study also found that more students would have transferred if there had been nearby high schools that offered a sufficient increase in chances of finishing in the top ten percent of the class. *Id.*

[25] Kalena E. Cortes and Andrew I. Friedson, *Ranking Up by Moving Out: The Effect of the Texas Top 10% Plan on Property Values*, 67 Nat'l Tax J. 51, 65-68 (2014).

[26] *Id.* at 74.

to attend Princeton, Rice, or the University of Michigan, the Texas top class rank policy does not change the students' incentives when deciding about high school choice.

In addition, while Texas guarantees admission to top class rank students, a top class rank is not the exclusive path to a public university in the state. For financial, family, and other reasons, many top class rank students do not exercise their option to enroll, leaving seats for non-top class rank applicants at even the most selective public universities.[27] Hence, Texas students can pursue their interest in an excellent state university without moving to a lower-performing school. At St. John's School, an elite private high school in Houston, more than 40 percent of the senior class was admitted to the University of Texas at Austin (UT-

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[27] In the early years of the Texas top class rank policy, about half of the UT-Austin first-year class comprised top class rank admittees. Sunny X. Niu and Marta Tienda, *Minority Student Academic Performance under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 32 Educ. Eval. & Pol'y Analysis 44, 49 (2010). Top class rank admittees constituted an increasing percentage of entering classes, peaking at 87 percent with the 2010 first-year class. To preserve admission prospects for non-top ten students, the state legislature capped top class rank enrollment at 75 percent of the first-year class for UT-Austin, beginning with the fall 2011 entering class. The University of Texas at Austin, *Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature: For the Period Ending Fall 2014* (Dec. 2014), http://www.utexas.edu/student/admissions/research/SB_175_Report_for_2014.pdf.

Austin) in 2014.[28] That the Texas policy has had as big an effect as it has is impressive given the limits of the incentive.

### C. Nationwide Implementation Would Increase the Impact of Top Class Rank Policies

Although top class rank policies can have only a modest impact when adopted just for public universities in a state, national implementation by public and private universities could easily have a substantial impact. If all selective universities, whether in Texas or in other states, adopted a top class rank model, the incentives for choosing a lower-performing school would become very strong. As discussed above, the benefits from attending an elite university are considerable.[29] Accordingly, competition for admission to selective universities is fierce. At Harvard, for example, 37,307 students applied for the class of 2019, and only 2,081—less than 6 percent—were accepted.[30] Stanford attracted even more applications, 42,487, and accepted only 2,144, or 5

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[28] Courtney Burger, Director of Admission, St. John's School, Houston, Texas. None of St. John's School's students qualify for the automatic admission based on class rank. Because St. John's does not rank its students, they are not eligible for the top class rank policy.

[29] See, *supra*, pages 8-9.

[30] https://college.harvard.edu/admissions/admissions-statistics.

percent of candidates.[31] Parents spend thousands of dollars on tutors and SAT prep courses, tens of thousands on tuition at top-notch private schools, and students look for every opportunity to burnish their resumes. The whole process has come to be known as the college admissions "arms race."[32] With the enormous interest in attending elite universities and the low odds for acceptance, families will be very attracted to options that meaningfully increase their chances of acceptance. And under a top class rank policy, moving to a lower-performing school district would increase the chances of acceptance greatly for most upper-income families.

This is not to say that families would move from the strongest school district to the weakest district. To some extent that might happen in the case of a low-performing district or school with an excellent track for gifted students. For the most part, though, one would expect more of a cascading effect. Some families would move from an A district to a B district, others from a B district to a C district, and so on. Early movers will make the lower-performing schools more attractive, and more families will be interested in moving in subsequent years. Over time, the incentives to move to lower-performing school districts would be self-

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[31] http://news.stanford.edu/news/2015/march/new-admits-finaid-032715.html.

[32] Don Hossler, Jacob P.K. Gross, and Brandi M. Beck, *Putting the College Admission "Arms Race" in Context: An Analysis of Recent Trends in College Admission and Their Effects on Institutional Policies and Practices* 3 (2010), http://www.nacacnet.org/research/publicationsresources/marketplace/documents/collegeadmissionarmsrace.pdf.

reinforcing and lead to a distribution of wealth across schools and school districts that is much more uniform than exists today.

Note that it would be important to make a top class rank *necessary* rather than just *sufficient* for admission to college. As the Texas experience indicates, the incentives created by top class rank policies are diluted if students can gain admission to selective universities without a top class rank.

How high would an applicant's class rank need to be if all selective universities adopted a top class rank policy? About 1.6 million students enroll as full-time freshmen in four-year colleges every year, and there are about 134,000 students in the entering classes at *Barron's* 82 most selective universities, plus the entering classes at University of California-Berkeley, University of Illinois, University of Michigan, UT-Austin, and University of Wisconsin, elite universities not included in *Barron's* top 82.[33] These data suggest that a top ten percent threshold would work well across all selective institutions.[34] At the most selective

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[33] Kevin Eagan et al., *The American Freshman: National Norms Fall 2014*, at 5 (2014), http://www.heri.ucla.edu/monographs/theamericanfreshman2014.pdf; *Ranking Colleges by Selectivity*, N.Y. Times, Apr. 4, 2013. Data for entering class size were drawn from each university's "common data set," which usually is available on the university's website. For a sample common data set, see http://dpb.cornell.edu/documents/1000563.pdf.

[34] Strictly speaking, 134,000 is less than nine percent of 1.6 million. But as the examples of Berkeley, Michigan, Texas, etc., indicate, *Barron's* most competitive list excludes some elite universities.

schools, a higher threshold might be needed, more in the one or two percent range. Indeed, Harvard's admitted cohort of 2,081 is less than two-tenths of a percent of the 1.6 million.

But even at the most selective institutions, a more generous top class rank could work. As discussed in the next section of this brief, highly selective schools could use a top five or ten percent rank as a threshold requirement for admission to narrow the pool of eligible applicants, and then use other criteria to choose among the pool, as long as the odds for admission from the narrowed pool were equal across different high schools. In other words, an elite college would automatically reject any student below the top five or ten percent and then decide among the remaining applicants based on whatever criteria it wanted, as long as the odds of admission from any one high school were similar to the odds of admission from other high schools. For example, Harvard would not be able to accept five or ten percent of the Phillips Exeter Academy class and one percent or less of the class from other high schools. Rather, the odds of admission to Harvard would have to be the same percentage from all high schools. That way the incentive to move to lower-performing school districts would be preserved.

While the choice of a less competitive high school may seem like an unfair way to "game" a top class rank policy, there is a more accurate way to view the strategy. This effect from top class rank policies allows universities to undo the existing gaming of the admissions process that has contributed to the high levels of economic inequality in the United States today. Current admissions policies reward the

development of a two-tiered education system, with "haves" and "have-nots," rather than a system in which all students can realize their potential. As a corollary, current admission policies reward parents who congregate in up-scale neighborhoods and abandon the inner city or other locales for their residences, taking their wealth to advantaged communities and exacerbating economic inequality in America. In contrast, top class rank policies reward parents for setting up their households in less advantaged communities and moving society in a direction of greater social and economic equality.

In addition to creating an incentive for higher-income families to move to lower-performing school districts, top class rank policies create important incentives for students already living in lower-performing school districts. While students at lower-performing schools face long odds for admission to selective colleges under traditional college admissions policies, top class rank policies give them much more favorable odds. Hence, when elite universities switch to a top class rank policy, they greatly increase the payoff for working hard at one's studies for students at the lower-performing schools.[35] Accordingly, top class rank policies should result in higher academic achievement generally among students at lower-performing schools. And that is exactly what has happened in Texas. Performance on the State's standardized testing for

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[35] Kalena E. Cortes and Lei Zhang, *The Incentive Effects of the Top 10% Plan* 4 (June 2012), http://users.nber.org/~cortesk/KCortes%20LZhang%20Incentives-Top10.pdf.

10th graders has increased in lower-performing schools, especially at the lowest-performing schools.[36]

## IV. TOP CLASS RANK POLICIES CAN BE DESIGNED TO MINIMIZE TRADE-OFFS

### A. Top Class Rank Policies Can Produce a Well-Rounded Student Body

Universities might worry that by focusing on only one metric of student achievement, much would be lost in terms of student body diversity and the richness of campus life. But top class rank policies can accommodate those concerns. If admissions offices want to consider athletic ability, musical talent, or other interests and experiences, they can do that too. As mentioned above, having a high class rank could represent a threshold requirement for admission, with other factors deciding which among the top class rank students are admitted. An elite college could initially narrow its applicant pool by excluding anyone with a high school class rank below the top five or ten percent. Then it could winnow the pool further by taking into account other aspects of an applicant's talents, experiences, and background. It just would be important to ensure that there be an equal chance of admission across different high schools for the top athletes, artists, or other applicants who bring special talents, experiences, or backgrounds to the table.[37]

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[36] *Id.* at 3.

[37] Equal treatment across high schools would include the principle that admissions be proportionate. Students at a high school with 1,000 students should have twice the odds of admission as a student at a high school with 500 students. This would prevent

And it would be important to keep top class rank as a threshold requirement if other metrics also are used. If students could overcome a lower class rank with strong athletic ability or exceptional musical talent, then students could game a top class rank system by transferring schools for senior year of high school. But waiting to transfer until senior year will not be attractive as long as class rank is critical. The students would bring their grades with them and therefore could easily fall short of the necessary grade point average (GPA) for a top class rank in their new school.[38] Parents will choose the less competitive school at the outset of their children's high school education if they want to improve their children's chances of admission to a selective university.

Top class rank as a threshold requirement with consideration of additional factors may seem complicated, and other factors would add more complexity. For example, it is simple to apply a top class rank policy to a high school with a senior class of a thousand, but what about very small high schools, where the senior class might have only ten students?

Top class rank policies are no more complicated than current admissions policies at selective colleges.

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families from gaming a top class rank policy by creating a lot of small high schools. In Texas, students are not eligible for the top class rank policy unless their high school has at least 10 students in the graduating class.

[38] Texas high schools addresses the transfer issue by requiring a minimum duration of attendance before a student can qualify for the top class rank automatic admission. Cullen et al., *supra* note 24, at 34.

Once a university abandons a simple reliance on a composite of high school grades and test scores and employs a holistic evaluation of candidates that includes a host of factors, the process is quite complex. In addition, the complexities of top class rank policies should not be exaggerated. With regard to the high school class size question, for example, more than 90 percent of students attend a high school with a senior class of at least one hundred. Students at very small schools can be considered by pooling them together.

### B. Top Class Rank Policies Can Maintain Academic Excellence

Universities also might worry that high school class rank provides an imperfect measure of academic ability. Finishing at the top of a low-performing school may say more about the competition than about the high ranker. Standardized test scores provide a measure that is uniform across high schools and that gives colleges a way to compare students from different schools.

As it turns out, top class rank policies can be implemented without compromising the academic strength of a university's student body. An analysis of the Texas top class rank policy compared the college grades and likelihood of graduation among beneficiaries of the policy at UT-Austin with the grades and graduation rates of the students who were displaced. The study found that the top rank admittees "consistently performed as well as or better than" the displaced students, even though the top rank admittees

arrived at UT with lower SAT or ACT scores.[39] And if top class rank policies are adopted widely, top class rank admittees should be much stronger than in Texas since there would be more movement of higher-income students to lower-performing schools.

This may seem surprising, but it is not. Test scores are based on a single test administered on a single day while class rank reflects four years of effort in courses that present similar challenges to those that high school students will face in college.[40] Studies have found that high school grades are a better predictor than test scores of college achievement and that the combination of grades and test scores offers only a small increase in predictive accuracy over grades alone.[41] According to one study based on nationwide

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[39] Niu and Tienda, *supra* note 27, at 64-65. Of course, the displaced students did not attend UT-Austin. To estimate their level of college achievement, the researchers compared the top ten admittees with a cohort of admitted non-top ten students who were similar in high school performance to the students who were displaced by the top ten policy. Thus, the study's results are conservative—the students who actually were displaced were viewed as weaker applicants than the students who made up the "displaced" student cohort in the study. *Id.* at 50-54. To be sure, UT-Austin expanded its academic support services to help top ten students make the transition from a low-performing high school to a high-performing college.

[40] Richard C. Atkinson and Saul Geiser, *Reflections on a Century of College Admissions Tests*, in *SAT Wars: The Case for Test-Optional College Admissions* 23, 25 (Joseph A. Soares ed. 2012).

[41] *Id.*; John Brittain and Benjamin Landy, *Reducing Reliance on Testing to Promote Diversity*, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University

data, using test scores in addition to high school class rank increases the ability of admissions officers to correctly predict college completion in only one to two out of every thousand cases.[42] In a study of graduation rates at public universities, test scores added little or nothing to the highly significant predictive power of high school GPA.[43] Studies at individual colleges come to similar conclusions. When the office of admissions at Johns Hopkins University looked at data for its students, it found that high school GPA was the best predictor of first-year college GPA "by a wide margin" when compared to SAT and SAT Subject Test scores. Indeed, consideration of SAT scores in addition to high school GPA improved the office's ability to predict first-year achievement by only two percent.[44]

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of Texas 160, 160-161 (Richard D. Kahlenberg ed. 2014); James Crouse, *Does the SAT Help Colleges Make Better Selection Decisions?*, 55 Harv. Educ. Rev. 195, 212 (1985); Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 974-975 (1996). Analyses from the not-for-profit that sponsors the SAT, the College Board, find somewhat better predictive value from the SAT than is found in analyses by outsiders. Brittain and Landy, *supra*, at 161.

[42] Crouse, *supra* note 41, at 209.

[43] William G. Bowen, Matthew M. Chingos, and Michael S. McPherson, *Crossing the Finish Line: Completing College at America's Public Universities* 113-116 (2009).

[44] Teresa Wonnell, Chloe Melissa Rothstein, and John Latting, *Predictors of Academic Success at a Highly Selective Private Research University*, in *SAT Wars: The Case for Test-Optional College Admissions* 137, 141 (Joseph A. Soares ed. 2012). SAT Subject Test scores added only one percent to the admissions

The small benefit from test scores has been illustrated in other ways. In a study of colleges that made submission of test scores optional, there were only marginal and statistically insignificant differences in college achievement between students who submitted test scores and students who opted not to submit their scores.[45] Moreover, because there is a much greater correlation between family wealth and test scores than between family wealth and high school grades,[46] consideration of test scores does more to distinguish between higher- and lower-income applicants than between stronger and weaker applicants.[47] Accordingly, it is becoming increasingly common for selective colleges, including Bowdoin, Bryn Mawr, Smith, and Wesleyan, to make submission of SAT or ACT scores optional for applicants.[48]

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offices ability to predict first-year achievement. *Id.* at 143. This study was conducted after the 2005 revision of the SAT. *Id.* at 137.

[45] William C. Hiss and Valerie W Franks, *Defining Promise: Optional Standardized Testing Policies in American College and University Admissions* 8 (Feb. 2014), http://www.nacacnet.org/research/research-data/nacac-research/Documents/DefiningPromise.pdf. The average final GPAs for the two groups were 2.88 for submitters and 2.83 for non-submitters, and the graduation rates were 64.5 percent and 63.9 percent, respectively. *Id.*

[46] Brittain and Landy, *supra* note 41, at 166.

[47] *Id.* at 160.

[48] *Id.* at 165; Nick Anderson, *George Washington University Applicants No Longer Need to Take Admissions Tests*, Wash. Post, July 27, 2015; FairTest: National Center for Fair & Open Testing, *180+ "Top Tier" Schools which Deemphasize the ACT/SAT in Admissions Decisions per U.S. News & World Report* Best Colleges

But if colleges wanted to take test scores into account, they still could do so. They could make the scores one of the additional factors used to winnow their applicant pools after narrowing the pools based on class rank. And by considering test scores in that fashion, very little would be lost. Test scores are least valuable when used to compensate for an applicant's low GPA.[49]

Other concerns about top class rank policies can be addressed in the design of the policies. For example, because students might take easier classes to ensure a higher GPA, high schools can give extra grade points for more challenging classes, as is common already, and colleges can make sufficiently demanding coursework a prerequisite to admission.[50]

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*Guide (2015 Edition)*, http://www.fairtest.org/sites/default/files/Optional-Schools-in-U.S.News-Top-Tiers.pdf. At Bowdoin, one reason for making SAT scores optional was the fact that among its honors graduates, only 31 percent had scored above the class average for the exam while 24 percent had scored below the average. David Owen and Marilyn Doerr, *None of the Above: The Truth Behind the SATs, Revised and Updated* 238 (1999).

[49] Owen and Doerr, *supra* note 48, at 236.

[50] Texas amended its top class rank policy to include a rigorous curriculum requirement. Marta Tienda, *Striving for Neutrality: Lessons from Texas in the Aftermath of* Hopwood *and* Fisher, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas 91, 251 n. 4 (Richard D. Kahlenberg ed. 2014).

### C. Top Class Rank Policies Can Ensure Racial, Ethnic, and Economic Diversity

If higher-income parents move their children to lower-performing schools, would that undermine the ability of top class rank policies to promote racial, ethnic, and economic diversity on college campuses? Top class rank policies produce much of their racial, ethnic, and economic diversity by drawing students from high schools that have high enrollments of minority and low-income students. If top class rank policies drive upper-income, white families to the minority high schools, those schools might send more upper-income, white graduates and fewer lower-income, minority graduates to selective institutions.

Top class rank policies need not be viewed simply as alternatives to affirmative action. UT-Austin, for example, employs both a top class rank policy and affirmative action for its undergraduate admissions. As in Texas, universities can compensate for any displacement effects of top class rank policies by taking into account an applicant's race, economic disadvantage, family hardship, or other obstacles. And even in the absence of an affirmative action policy, colleges can maintain racial and ethnic diversity with top class rank policies by reserving seats in their entering classes for applicants who have experienced economic disadvantage, family hardship, or other obstacles. While consideration of socioeconomic disadvantage usually is not as effective as direct consideration of race and ethnicity at promoting racial

and ethnic diversity,[51] it is possible to fashion policies based on economic class that are more effective than direct consideration of race or ethnicity.[52]

Moreover, any displacement of minority and low-income students would diminish over time. As school districts become less stratified in terms of wealth, race, and ethnicity, poor and minority students will enjoy greater opportunities to realize their potential. Recall in this regard the earlier point that what matters more for economic mobility of children is not the degree of economic inequality but the degree to which neighborhoods are economically segregated.[53]

In sum, while there are potential disadvantages of top class rank policies, they can be minimized by sound design of the policies. Adopting top class rank policies poses little risk to higher education. On the other hand,

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[51] Anthony P. Carnevale, Stephen J. Rose, and Jeff Strohl, *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas 187, 191-193 (Richard D. Kahlenberg ed. 2014).

[52] Matthew N. Gaertner, *Advancing College Access with Class-Based Affirmative Action: The Colorado Case*, in *The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas 175, 180-181 (Richard D. Kahlenberg ed. 2014).

[53] See, *supra*, page 6. Note that top class rank policies have an inherently limited displacement effect. The more rapid the movement of upper-income families to lower-performing school districts, the quicker the dissipation of the displacement effect. On the other hand, the more gradual the movement of upper-income families, the less pronounced will be the displacement effect.

the potential payoff from the policies is very high. If top class rank policies make for greater economic equality among communities in the United States, then the policies' benefits would extend beyond the small percentage of children who would achieve a top class rank—or the small percentage who benefit currently from affirmative action policies[54]—to all of the children in currently disadvantaged communities.

To fully appreciate top class rank policies, it is important to recognize what they do not entail. They do not require any tax increases or expansion of public benefit programs—indeed, they reduce the demand on programs for the poor. Neither legislatures nor courts need act. No one has to be forcibly bused to school. Leading universities can simply act on their own. To be sure, they would have to act collectively—individual colleges would be reluctant to act alone, for fear that they would suffer in the *US News* or other rankings if their average SAT and ACT scores declined. But elite universities already know how to act collectively. They use a common application form,[55] and they have used the same formula for calculating financial aid.[56] By

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[54] Not only does affirmative action in higher education reach a small percentage of minority students, it also reaches the more affluent in the minority student pool. Richard H. Sander, *Class in American Legal Education*, 88 Denv. U. L. Rev. 631, 651 (2011).

[55] Jessica Gross, *Who Made That? (College Application)*, N.Y. Times, Nov. 10, 2013. To be sure, many colleges request supplemental application materials.

[56] *United States v. Brown Univ.*, 5 F.3d 658, 662-663 (3d Cir. 1993). The federal government also has established financial aid guidelines for federal loans or loan guarantees. *Id.* at 662.

acting together on class rank policies, selective universities can make it more possible for the United States to live up to its vision as a land of opportunity for all.[57]

## CONCLUSION

Top class rank policies offer an important benefit that is lacking in other college admissions policies—the ability to diminish the incentives for socioeconomic inequality that current admissions policies create. The elite universities today reward upper-income parents

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[57] There might be some antitrust concern with common action, but it likely would survive a legal challenge on antitrust grounds. The most important precedent here is the litigation over agreements by Ivy League and other leading schools to share financial aid information and offer the same level of aid to each student (i.e., although different students might receive different levels of aid, no student could obtain more aid from one of the schools than from the other schools). Many of the schools signed a consent decree with the Justice Department, but MIT went to court, and the Third Circuit's decision in the case suggests that courts would be sympathetic to a common admissions policy modeled upon the Texas top class rank approach. *Brown Univ.*, 5 F.3d at 678 (observing that universities may be given more freedom under the Sherman Act if their concerted action broadens accessibility to higher education because "[i]t is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education"). In addition, the consent decree only prohibited common action on decisions about financial aid, tuition and fees, and faculty salary levels. *United States v. Brown Univ.*, 805 F. Supp. 288 (E.D. Pa. 1991). Since antitrust law is more concerned about price-fixing than with other kinds of concerted action, agreements about financial aid, tuition, and faculty salaries are going to be more difficult to sustain than agreements about admissions criteria. And if antitrust concerns are serious, the colleges could seek an exemption from Congress.

who make choices that worsen economic disparities among residential neighborhoods and therefore exacerbate economic inequality in the United States. With wide implementation of top class rank policies by selective universities, admissions practices would encourage parental decisions that foster a greater balance in wealth across different communities and provide a meaningful opportunity for children in all neighborhoods to realize their potential. Accordingly, regardless of whether elite universities maintain their affirmative action policies, they would do much good by adopting top class rank policies.

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